FEDERAL MEDIATION AND CONCILIATION SERVICE
UNITED STATES GOVERNMENT
UPPER MIDWESTERN REGION

International Brotherhood of
Electrical Workers, Local 949,

Union Grievant.

- and –

Intek Plastics, Inc.,

Employer Respondent.

Grievance Arbitration
FMCS Case No. 060206-53400-7
Arbitrator's Award

ARBITRATOR:	Rolland C. Toenges
DATE OF GRIEVANCE:	October 10, 2005
DATE OF HEARING:	August 28, 2006
RECEIPT OF POST HEARING BRIEFS:	October 1, 2006
DATE OF AWARD:	December 29, 2006

ADVOCATES

FOR THE EMPLOYER:	FOR THE UNION:
Joel E. Abrahamson, Attorney Leonard, Street and Deinard	Connie L. Howard, Attorney Metcalf, Kaspari, Howard, Engdahl & Lazarus, P.A.

WITNESSES[1]

Ken Kimmes, VP Operations, Support Services	Judy C. Partington, Grievant
Chris Odman, Warehouse Supervisor	Gail Dahl, Shipping Clerk
Michael Bates, Director of Administration	Vincent R. Guertin, Business Agent
Ron Chapin, Maintenance Lead	Scott Clothier, Chief Steward
Vera Smith, Customer Service Representative	

[1] Witnesses listed in order of appearance

ISSUE

Did the Employer violate the Collective Bargaining Agreement by not allowing Grievant to work as a Shipping Clerk because of her claimed inability to operate the "Bendi Lift?"[2]

JURISDICTION

The matter at issue, regarding interpretation of terms and conditions of the Collective Bargaining Agreement (CBA) between the Parties, came on for hearing pursuant to the grievance procedure contained in said Agreement. The Grievance Procedure (Article 20, Step 5) provides as follows:

> "Step 5: Should the Union within five (5) working days after receipt of the Employer's Step 3 Answer refer the grievance to arbitration, either party may, not later than ten (10) days after such referral, direct a letter to the Minnesota Bureau of Mediation Services or the Federal Mediation and Conciliation Service requesting a list of seven (7) persons from which the arbitrator is selected.
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> Within ten (10) days after the receipt of the arbitration list, the parties shall select the arbitrator from such list by disqualifying three (3) panel members each (one [1] at a time, alternately, with the first strike to be determined by the flip of a coin), the remaining panel member being designated as the arbitrator. Immediately upon the selection of an arbitrator, the parties shall direct a letter to the arbitrator requesting that he/she contact the parties so that the grievance might promptly be heard and determined.
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> Section 3. Authority of the Arbitrator. The arbitrator shall have authority to decide all the issues that may arise under the provisions of this Agreement. However, the arbitrator shall have no authority to hear or decide questions involving the contracting out of work except as they relate to the Addendum covering said subject, or to amend, add to, delete or in any way modify any of the terms or provisions of this Agreement.
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> Section 4. Hearing and Decision of Arbitrator. The arbitrator shall hold a hearing as soon as possible after the grievance has been referred to him/her and shall render his/her award with thirty (30) calendar days of the close of the hearing, unless that time is extended by mutual agreement of the parties. The Employer and the Union agree that the decision of the arbitrator shall be final and binding on both parties.

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[2] It is noted that the Parties are not in agreement on the issue statement put before the Arbitrator. Therefore, the Arbitrator has fashioned an issue statement that best represents the issue in dispute.

> Section 5. Arbitration Expense. Each party shall bear equally the expense of the arbitrator. Other costs shall be borne by the party incurring such costs.

The Parties selected Rolland C. Toenges, as the Arbitrator to hear and render a decision in the interest of resolving the disputed matter, from a list of arbitrators provided by the Federal Mediation and Conciliation Service.

The Arbitration hearing was conducted as provided by the terms and conditions of the CBA and the Federal Mediation and Conciliation Service. The Parties were afforded full opportunity to present evidence, testimony and argument bearing on the matter in dispute.

The Parties jointly stipulated that "Short Term Disability pays two thirds (2/3) of the base wage rate in effect at onset of the disability."

Post hearing briefs were received on October 1, 2006. The hearing was held open until November 1, pending receipt of reply briefs or any further submissions. Being none, the hearing was closed on November 1, 2006.

BACKGROUND

Intek Plastics, Inc. (Employer) designs and manufactures engineered thermoplastic extrusions, fabricated sub-assemblies and provides other services for its customers. Intek operates two plants in Hastings, Minnesota – a North Plant (original) and a South Plant.

Intek Plastics, Inc. has employed the Grievant since February 1989. The Grievant, along with other workers at the North and South Intek Plants, is represented by Local 949 of the International Brotherhood of Electrical Workers (Union). The Employer and Union are parties to a Collective Bargaining Agreements (CBA) covering the period January 2005 through February 28, 2011. [3]

The Grievant has been employed in the classification of Shipping Clerk since August of 2000. She previously worked in several different classification titles, including Utility Worker, Materials Helper, Quality Inspector and Shipping Helper.[4]

Prior to being employed by Intek, the Grievant had suffered serious leg injuries in an automobile accident occurring in 1984. The injuries left the Grievant's right leg about an inch and one half shorter that her left leg and two shoe sizes smaller. Notwithstanding this condition, the Grievant has worked successfully without accommodation in a variety of positions during her seventeen (17) years with Intek.

As a Shipping Clerk, the Grievant is responsible for loading and unloading trucks and moving inventory using forklift type machines. Prior to the summer of 2005 she was

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[3] Joint Exhibits #J-1a and #J-1b.

[4] Union Exhibit #1.

assigned to operate a standard forklift exclusively. Beginning the summer of 2005 she was trained and assigned to also operate an Order Picker and "Bendi Lift."

In order to remain competitive in the plastics industry, Intek focuses on economy of operations, including maximum flexibility in utilization of its work force. In keeping with this goal, product inventory being stored at a Hudson, Wisconsin warehouse was moved to the North Hastings Plant in 2005.

To fit the inventory into the North Plant, Intek installed a racking system with narrow aisles in the Shipping and Receiving area and purchased special machines, including a "Bendi Lift," that were compatible with navigating the narrow aisles.

All of Intek's Shipping Clerks, including the Grievant, were trained in the operation of the "Bendi Lift" in June 2005. The Grievant was one of seven shipping personnel who received the training and was issued a written certification confirming her proficiency in operation of the "Bendi Lift." The Grievant began operating the "Bendi Lift" in June 2005.

Intek's Shipping Clerks regularly work at both the North and South Plants. It is generally a daily occurrence that a Shipping Clerk who reports to the South Plant must also perform work at the North Plant. This is due to such factors as (1) handling of workload differentials between the two plants, (2) vacation coverage, (3) covering unscheduled absences, (4) covering weekend shifts, and (5) ensuring the equitable distribution of overtime as required by Article 15, section 7 of the CBA.[5]

A Shipping Clerk working at the North Plant must be able to operate the "Bendi Lift" and the other Order Picker machines. On a typical day, a Shipping Clerk will operate the "Bendi Lift" for four (4) to six (6) hours and an Order Picker for two (2) to four (4) hours. In the fall of 2005 the Grievant had spent more time working at the North Plant due to business conditions and the limited size of the Shipping staff. The Grievant was splitting her work time between the North and South Plants and Shipping Clerks were working substantial overtime at the North Plant.

On or about September 7, 2005, the Grievant presented the Employer with a note from her doctor,[6] stating that she was limited to a maximum of eight (8) hours work per day due to problems with her pre-existing ankle and leg injury.[7] The Employer honored the Grievant's request to be relieved of more than eight (8) hours of work per day.

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[5] CBA, Article 15, Section 7. Overtime work Distribution. When there is overtime work to be performed in any classification, such overtime work will be distributed as equitably as possible among employees who are regularly engaged in such work. . .

[6] Joint Exhibit #2.

[7] The Grievant suffered an injury to her ankle and leg in a auto accidents in 1984 which left her right ankle and leg somewhat shorter than her left leg.

The Grievant submitted a new note from her doctor on September 20, 2005 to the effect that she could only operate the standard Fork Lift machine (not the "Bendi Lift"). [8] The Employer took the position that operation of the "Bendi Lift" was an essential requirement of Shipping Clerk duties and offered the Grievant work in the "Utility Classification." Rather than accept the "Utility Classification" work, the Grievant chose to collect short-term disability (STD) benefits. The STD benefit paid two thirds (2/3) of her regular wages as a Shipping Clerk, for up to twenty-six (26) weeks.

On October 10, 2005, the Union filed a grievance on behalf of the Grievant requesting that she be assigned work in the Shipping Clerk classification with reasonable accommodation and be made whole in every respect. The Union cited violation of Articles 3, 21 and all other applicable provisions of the CBA.[9]

On October 18, 2005, the Union informed the Employer that it was appealing the grievance to Step 3 of the CBA Grievance Procedure. On or about November 10, 2005, the Employer informed the Union that the Grievant was not qualified to work as a Shipping Clerk as operation of the 'Bendi Lift" was considered an essential part of Shipping Clerk duties. The Employer offered the Grievant work in the Utility classification.

On or about December 28, 2005, the Employer provided the Grievant with a compact disc video, setting forth the essential functions required of a Shipping Clerk, to assist in her upcoming medical evaluation at the Mayo Clinic.[10]

On or about January 4, 2006 the Grievant presented the Employer with an "Activity/Work Status Report from the Mayo Clinic. This report indicated the Grievant should use only the standard forklift limited to 80% of the time and may try limited use of the "Bendi Lift" 20% of the time.

Following receipt of the Mayo Report, communications took place between the Union and Employer concerning alternative ways to resolve the grievance matter. In a letter dated January 31, 2005, the Employer informed the Union and Grievant that an essential requirement of Shipping Clerk duties is work at both the North and South Plants operating the Order Picker, Bendi Lift, Standard Fork Lift and Stand-up Electric. Further the work time necessary on this equipment is not predictable as workloads vary from day to day. The Employer indicated a willingness to consider the reasonableness of alternative ways to find work for the Grievant and repeated its offer of assigning the Grievant work in the Utility Classification.

On or about February 6, 2006 the Union informed the Employer that it was proceeding to the arbitration step of the CBA Grievance Procedure.[11]

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[8] Joint Exhibit #3.

[9] CBA, Article 3, Management Rights.
CBA, Article 21, Nondiscrimination.

[10] Joint Exhibit #12.

[11] Joint Exhibit #8

Shortly before the STD benefits were about to expire (on or about March 24, 2006), the Grievant acknowledged that the "Bendi Lift" seat was adjustable and she could now operate it knowing that it could adjusted to accommodate her (shorter leg) limitation. On or about March 31, 2006, the Parties reached a "Temporary Accommodation Agreement" based on the Grievants acknowledgement that the seat on the "Bendi Lift" was adjustable. The Accommodation Agreement provided for a trial period to determine if adjusting the seat may be sufficient to eliminate the Grievant's medical restrictions

On April 12, 2006, the Grievant requested that she be allowed extend the pedal on the "Bendi Lift" with a Styrofoam block. The Employer approved

On or about April 19, 2006, the Union submitted a "To Whom It May Concern" report [12] with photos [13] to assist the Grievant's medical evaluators in determining whether, with the seat adjustment plus the pedal extension, she could be approved for operation of all the equipment Shipping Clerks are required to operate.

On or about May 5, 2006, the Mayo Clinic issued a medical evaluation that stated "This is to certify that the above named patient [Grievant] may return to work/school full time: May 5, 2006. RESTRICTIONS: May return to work driving forklift as tolerated with a pedal extension to help alleviate pain."[14]

Thereafter, the Grievant returned to work and performed all the duties required of a Shipping Clerk using the seat ajustment available on the "Bendi Lift" and the Styrofoam block pedal extension.

What remains at issue in the instant case is the difference between the Grievant's STD benefit and the Shipping Clerk wage and benefits she would have received, had she been allowed to work in that classification during the period she received STD benefits.

JOINT EXHIBITS

J-1a. CBA effective March 1, 2002 through February 2005.

J-1b. CBA effective January 1, 2006 through the last day of February 2011.

J-2. Medical report for Grievant dated September 7, 2005.

J-3. Medical report for Grievant dated September 20, 2005.

J-4. Memo, RE: Report of Workability - Hoover to Grievant, dated September 22, 2005.

J-5. Memo, RE: Report of Workability – Carlson to Grievant, dated September 27, 2005.

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[12] Joint Exhibit #19A
[13] Joint Exhibit #19B
[14] Joint Exhibit #20

J-6. Letter, RE: Placing Grievant of STD – Guertin to Bates, dated October 3, 2005.

J-7 Letter, RE: STD Application Still Pending – Bates to Guertin, October 6, 2005.

J-8. Letter, RE: Grievance Filed – Guertin to Bates/Simmons, dated October 10, 2005.

J-9. Letter, RE: Appealing Grievance to Step 3 – Guertin to Tracy, October 18, 2005.

J-10. Link Claim Statement, RE: STD Application, by Grievant, dated October 20, 2005.

J-11. Letter, RE: Employer 3rd Step Response, Tracy to Guertin, November 23,2005.

J-12a. Letter, RE: DVD Job Requirement Info. – Bates to Grievant, December 18, 2005.

J-12b. DVD RE: Job requirements of Shipping Clerk Classification.

J-13. Activity/Work Status Report, Mayo Clinic - RE: Grievant, dated January 3, 2006.

J-14. Letter, RE: Meeting on Mayo Clinic Report – Guertin to Tracy, January 4, 2006.

J-15. Letter, RE: Return to Work Assignment – Guertin to Grievant, January 4, 2006.

J-16. Letter, RE: Follow-up to 1/26/06 Meeting – Tracy to Guertin & Grievant, 1/31/06.

J-17. Letter, RE: Union Petition for Arbitration – Guertin to Tracy, February 6, 2006.

J-18, Temporary Accommodation Agreement, RE: Grievant Return to Work, 3/31/06.

J-19a. Letter, RE: Transmittal of Photos to Medical Evaluator, Guertin, April 19, 2006.

J-19b. Photos of Grievant operating Pedal on "Bendi Lift."

J-20. Medical Report of Mayo Clinic, RE: Grievant may return to work May 5, 2006.

J-21. Grievant's Earning Record – 7/31/05 through 5/14/2006.

UNION EXHIBITS

U-1. Jobs Grievant has had with Intek since employed on February 6, 1989.

U-2. Photo of Grievant's leg and ankle when injured in 1984.

U-3. Grievant's concerns about her relationship with new supervisor, 1/12/05.

U-4. Certification of Training on Picker, Bendi and Forklift Safety.

U-5. Shift Rebalancing Sign-up Sheet, 1/13/05 – Grievant signed up for South Plant.

U-6. Pending Charge of Discrimination, dated March 20, 2006.

U-7. Personal Notes dated 11/16/2005, RE: Grievant's limitations for work.

U-8. Mayo Clinic Medical Report of Grievant's condition, dated 1/18/06.

U-9. Personal Notes, dated 1/26/06, RE: Grievant's limitations for work.

U-10. Examples of Intek Employees Allowed to Work with Restrictions.

EMPLOYER EXHIBITS

E-1. Letter, RE: Efforts to Attempt to Accommodate Ms. Partington, 4/13/06.

E-2. Photos showing the seat adjustment controls on the "Bendi Lift."

E-3. Safety and Operator Training Course – Narrow Aisle (Bendi) Forklift.

POSTION OF THE PARTIES

THE UNION SUPPORTS ITS CASE WITH THE FOLLOWING:

1. This is a case of persecution by the Employer against a long-term employee with a disability.

2. The Grievant qualifies as disabled, both based upon having a physical impairment, which materially limits one or more major life activities, and based upon having a record of such impairment. She cannot run, walk distances, or stand for any significant period of time. She cannot bend or flex her foot.

3. The Grievant is significantly restricted as to the duration and conditions under which she can perform such major life activities.[15]

4. The CBA prohibits discrimination based on any status afforded protection under applicable statutes or ordinances.

5. Since the Americans With Disabilities Act (ADA) and the Minnesota Human Right Act (MHRA) both prohibit discrimination on the basis of disability and require employers to reasonably accommodate disabled employees, the CBA likewise must be read as requiring nondiscrimination and reasonable accommodation of disabilities.

[15] 29 C.F.R. S1630.2(i)(ii).

6. The Employer discriminated against the Grievant by arbitrarily singling her out for excessive work on equipment that aggravated her injury.

7. There is a stark contrast between the Employer's treatment of the Grievant and other workers – no effort was made to accommodate the Grievant before denying her work.

8. The Employer, particularly Odman, seemed determined to drive the Grievant out of the shipping department, if not the Company, until she raised the specter of litigation by filing disability discrimination charges.

9. Although the Employer has accommodated other employees with disabilities it has gone out of its way to aggravate the Grievant's pre-existing leg injury.

10. Rather than follow the usual practice of assigning shipping personnel from the South Plant to assist at the North Plant, on a rotating basis as needed, the Shipping Supervisor (Odman) began assigning the Grievant to work at the North Plant consistently.

11. The consistent assignment to the North Plant was made notwithstanding notice from the Grievant that working on the "Bendi Lift" on a regular basis was causing her significant pain.

12. When the Grievant's doctors imposed medical restrictions, the Employer retaliated by forcing her out on short-term disability.

13. Pleas by the Grievant and Union to work out an accommodation allowing her to work in her bid position fell on deaf ears.

14. Not until the Grievant filed discrimination charges with the Minnesota Department of Human Rights did the Employer agree to allow her to return to work.

15. The Grievant, without assistance from the Employer, discovered that she could successfully operate the "Bendi Lift" by adjusting the seat and using a pedal extender.

16. The Grievant is entitled to the wages she lost during the approximately six (6) months she was out on short-term disability because of the Employer's intransigence in refusing to accommodate her disability.

17. The Grievant further seeks an order compelling the Employer to return her to the job she bid at the South Plant and prohibiting any further discrimination against her by singling her out for disproportionate assignment to the North Plant.

18. Further, the Grievant asks the Arbitrator to order the Employer to provide a permanent OSHA-approved pedal extender to replace the Duct taped block of Styrofoam she is currently affixing to the "Bendi Lift" with rubber bands.

19. The Employer chose not to comply with the medical restrictions prescribed by Doctor Yellin, something that could have easily done by assigning other personnel from the South Plant to cover the extra work at the North Plant, or even by assigning "Bendi Lift" operation to the other clerk at the North Plant.

20. The Employer's proposal to move the Grievant to a Utility position would have meant a pay cut from $19.26 per hour to $13.32 and would have required her to stand for long periods of time, likely to aggravate her ankle.

21. Prior to the Union's request for Chapin's assistance, to investigate a pedal extender device, the Employer had never investigated pedal extenders or other mechanical adjustments to make it easier for the Grievant to operate the "Bendi Lift."

22. The Employer's sole contribution to a pedal extender device was agreeing to allow the Grievant's use of it on a trial basis, provided it would not interfere with the operation of any equipment or other job duties.

23. Since May 2005, the Employer has taken no steps to obtain a more permanent pedal extender with a more secure method of attaching the block to the pedal of the "Bendi Lift."

24. Over the Union's objections, the Employer has continued to assign the Grievant to work full-time at the North Plant following expiration of the agreed temporary accommodation period, even though the employee she replaced has since returned to work.

25. Supervisor (Odman) went out of her way to make life difficult for the Grievant.

26. There is no evidence that the Employer investigated the Grievant's complaint of being treated unfairly by Odman or took into consideration Odman's insistence of assigning her to the North Plant day after day, notwithstanding the availability of other less senior employees who could operate the "Bendi Lift."

27. Odman's denial that she bean singling out the Grievant to work at the North Plant is not credible in face of Dahl's corroboration of the Grievant's testimony and the absence of records relating to the assignments.

28. Odman could have structured the work at the North Plant to minimize the amount of time the Grievant had to spend on the "Bendi Lift" or have interspersed it with other tasks to give the Grievant's bad leg a break.

29. The Employer discriminated against the Grievant by failing to reasonably accommodate her so she could continue working in her bid position.

30. The Employer made no attempt to accommodate the Grievant, even though it would have been a simple matter to return her to her regular bid job at the South Plant until she could see the specialist at the Mayo Clinic.

31. The Employer's summary exclusion of the Grievant from the workplace not only ran counter to past practice of accommodating workers, it short circuited the interactive accommodation process called for in the CBA, the MHRA and ADA.[16]

32. The Employer's argument rests on an overly broad reading of the Grievant's essential job functions as Shipping Clerk at the South Plant.

33. The Employer's claim that the Grievant must have unlimited ability to operate all forklifts at both plants must be viewed with skepticism. The Employer has not identified this as an essential requirement in its job postings or descriptions as are specified by ADA.[17]

34. The Employer's failure to train the Grievant on the "Stand-up Fork Lift" at the South Plant reinforces the conclusion that operation of all four (4) types fork lifts is not an essential component of the Shipping Clerk job.

35. Even if one assumes that it may be necessary for a South Plant Shipping Clerk to operate the "Bendi Lift" at the North Plant occasionally, it does not follow that to do so on a full time basis is an essential function of the Shipping Clerk job.

36. Considering: (1) that there is no "Bendi Lift" at the South Plant (Grievant's primary assignment); (2) that assistance at the North Plant is usually needed on a sporadic basis; (3) there are multiple other Shipping Clerks at both plants who could operate the "Bendi Lift;" and (4) there is substantial shipping work at the North Plant not involving operation of the "Bendi Lift," it is hardly essential that the Grievant operate the "Bendi Lift" on a full-time ongoing basis.[18] [19]

37. Even if one disregards the Employer's questionable evaluation of the Grievant's essential job functions, forcing her out of work violated the CBA because no effort was made to determine if she could perform the essential job functions with "reasonable accommodation."

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[16] Min. Stat. Sec 363A.03, subd 36(1): 42 U.S.C. Sec. 12111, subds.. 8 and 9.
[17] 42 U.S.C. Sec. 12111, subd. 8.
[18] Amount of time is one factor to be considered in determining whether a job function is essential. 29 C.F. R. Sec. 1630.2 (n) (iii).
[19] Two Shipping Clerks at North Plant and four at the South Plant on day shift. (J-12a.)

38. The Employer had an obligation to initiate an interactive process to evaluate potential options for accommodation and failed to live up to this obligation. [20]

39. Had the Employer worked cooperatively with the Grievant and the Union to explore potential accommodations in September 2005, she would not have had to miss any work and suffered loss of wages and benefits.

40. The Employer cannot escape liability for its intransigence in refusing to accommodate the Grievant by its offer in mid-November, 2005 to transfer her to a Utility position.[21]

41. Reassignment to the Utility position was not a viable alternative for the Grievant because it meant a permanent demotion with a one third cut in pay and would have required a great deal of standing.

42. The accommodation the Grievant sought from the first was an accommodation that would have allowed her to continue working in her Shipping Clerk position. This was finally accomplished when she created her own make shift pedal extender in the spring of 2006.

43. The Employer's attempt to portray the Grievant's difficulty operating the "Bendi Lift" as fiction, designed to avoid working with McCrae and get paid disability must be rejected. This is a red herring designed to distract from the Employer's own faulty conduct.

44. The Grievant's pain and leave is based on reliable medical documentation of three (3) separate doctors, including a Mayo Clinic specialist. Furthermore, she returned to work as soon as the Union managed to negotiate a temporary accommodation agreement on her behalf.

45. The notion that the Grievant voluntarily suffered significant financial loss to avoid working with McCrae is not credible. Although they may have had difficulties years ago, they had a comfortable working relationship by the fall of 2005. In any case, McCrae went out on medical leave removing the notion that the Grievant was motivated by a desire to avoid working with McCrae.

46. In order to remedy the Employer's violations, the Union asks the Arbitrator to:

    a. Award the Grievant lost wages and benefits for the period from September 27, 2005 until April 3, 2006, while she was off work.

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[20] To determine reasonable accommodation it may be necessary to initiate an informal interactive process. Etc. 29 C.F.R. Sec. 1630.2 (o)(3)

[21] EEOC's October 17, 2002, ADA enforcement Memo: Before considering reassignment, employers should first consider those accommodations that would enable employee to remain in his/her current position. . .

b. Order Intek to return the Grievant to her bid job at the South Plant, and cease singling her out for disproportionate work at the North Plant in the future; and

c. Order Intek to provide a permanent, OSHA-approved pedal extender for the Grievant to use when she is required to operate the "Bendi Lift."

THE EMPLOYER SUPPORTS ITS CASE WITH THE FOLLOWING:

1. Article 16 of the CBA and the March 27, 1997 Letter of Agreement on page 41, give the Employer the exclusive right to determine the qualifications necessary to work as a Shipping Clerk.

2. The assertion by the Grievant that she should have been permitted to pick and choose which essential functions of the Shipping Clerk position that she wanted to perform and receive 100% of regular wages while receiving short term disability benefits has no basis in the CBA and the grievance must be denied.

3. Union member Ronald Chapin, who has twenty-three (23) years of experience, trained the Grievant in operation of the "Bendi Lift" along with seven other Shipping Clerks. Chapin considered the Grievant adequately trained and capable of operating the "Bendi Lift." The Grievant was provided with a written certification confirming her proficiency in operation of the "Bendi Lift."

4. It is a frequent occurrence that Shipping Clerks assigned to report to the South Plant are also required to work at the North Plant due to (1) handling of workload differentials between the two plants, (2) covering vacations, (3) covering unscheduled absences, (4) covering weekend shifts and (5) ensuring the equitable distribution of overtime among the Shipping Clerks as required by the CBA.[22]

5. Mr. Kimmes' testimony established that, even prior to the purchase of the new equipment at the North Plant, the seven-person Shipping Clerk crew was experiencing an average of 280 working days a year in which crossover between the plants was required just to cover vacation/PTO.

6. Grievant, by her own testimony, acknowledged the fact that the interchange of Shipping Clerks occurs on a daily basis and it is impossible for a Shipping Clerk to be able to perform the duties of the job at the North Plant without being able to operate the "Bendi Lift" and Order Picker.

7. Grievant, by her own testimony, acknowledged that, in a typical day, a Shipping clerk will operate the Bendi for four (4) to six (6) hours and the Order Picker for two (2) to four (4) hours. This undisputed fact is memorialized in the December 28, 2005 letter to Grievant.[23]

[22] CBA Article 15, Section 7.
[23] Joint Exhibit J-12a.

8. In light of the Grievant's own testimony, the record is undisputed that the ability to operate the "Bendi Lift" a minimum of four (4) to six (6) hours a day is an essential function of the Shipping Clerk position.

9. The Union and Grievant both acknowledged that both before and after the Grievant began reporting to Ms. Odman, She [Grievant] and the other Shipping Clerks who reported to the South Plant all took turns "moving back and forth" between the North Plant and the South Plant.

10. In the words of the Grievant, she had to spend time working at the North Plant in the fall of 2005 because business conditions and the small size of the Shipping Clerk staff dictated that the Employer "needed more help there at the North Plant."

11. Fellow Shipping Clerk, Gail Dahl, acknowledged, via her testimony, that all Shipping Clerks are regularly required to rotate through the North Plant as part of their regular job duties.

12. Vera Smith, Customer Service Representative, testified that on September 7, 2005, Grievant, who was splitting her time between the North Plant and the South Plant, approached her and stated that she did not like certain co-workers at the North Plant and that she was therefore going to ask her doctor to fax over some type of restriction in order to get her away from the North Plant.

13. Vera Smith, testified that Grievant then used the telephone at her [Smith's] desk to place a call to a doctor's office and that a fax came through shortly afterward stating Grievant could not work overtime hours.[24]

14. The testimony of both Grievant and Odman was that Shipping Clerks at the North Plant were working substantial overtime at this time [September 2005].

15. It is obvious that Grievant's real plan was to use the doctor's note as a ticket out of a plant where she was having difficulty getting along with co-workers (rather than a function of a genuine medical concern).

16. Although the Employer honored the Grievant's request to not work overtime, the Grievant did not get her wish of being permitted to work only at the South Plant. She then brought in a new doctor's note on September 20, 2005 in which it was asserted, for the very first time, that she could only operate the standard forklift.[25]

17. The Grievant acknowledged on cross-examination that her doctor did not know the difference between a standard forklift and the "Bendi Lift" or Order Picker. In other words, the doctor relied solely on her description of the equipment and her desire to get out of performing any work at the North Plant.

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[24] Joint Exhibit, J-2.
[25] Joint Exhibit, J-3.

18. The Employer reminded the Grievant in a September 22, 2005 memo[26] that the ability to operate *all lifts at both plants* is an essential job function of Shipping Clerk.

19. Vincent Guertin, Union Business Agent, acknowledged in his testimony, and in the October 3, 2005 letter he wrote,[27] that the Grievant was indeed unable to perform all of the essential functions of Shipping Clerk due to her professed inability to operate the "Bendi Lift."

20. The Grievant's professed reason for not being able to operate the "Bendi Lift" was an injury she had suffered in an auto accident some twenty (20) years earlier. According to her testimony and STD application, she had reached maximum medical improvement from this injury "years ago."

21. Grievant's testimony was that she did not compare the wage rate for the Utility Classification with that of Shipping Clerk and preferred to receive STD benefits.

22. Grievant testified that she received a weekly STD benefit of $513.63 from the first week of October 2005 through March 29, 2006, which is two-thirds (2/3) of her regular wage as a Shipping Clerk, without performing any work.

23. Michael Bates, Director of Administration, testified that the STD rate has always been two-thirds (2/3) of the regular wage rate and is for a maximum of twenty-six (26) weeks, an undisputed fact.

24. The Grievant's claim that she first discovered the "Bendi Lift" seat was adjustable in March 2006 is completely unbelievable for a host of reasons.

25. The lever that adjusts the "Bendi Lift" seat sticks out prominently from the bottom of the seat signaling to even a layperson that the obvious purpose of the lever is to slide the seat forward and backward.

26. Ken Kimmes and Chris Odman both testified that the first thing any Shipping Clerk does after climbing into the "Bendi Lift" is to adjust the seat – it is common knowledge that the seat slides in both directions.

27. Most compelling is the testimony of fellow bargaining unit member, Ron Chapin, Maintenance Lead, who testified that he trained the Grievant on operation of the "Bendi Lift" by reviewing the Training Manual[28] with her in June 2005.

28. The second bullet point in the right-hand column of page 12 of the Training Manual specifically addresses the fact the "Bendi Lift" seat is adjustable.

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[26] Joint Exhibit, J-4.
[27] Joint Exhibit, J-6.
[28] Employer Exhibit, E-3.

29. The Grievant did not deny she had been trained on adjusting the seat, but rather testified that she "has no recollection" of the training covering the adjustable seat.

30. Although the Union attempted to get Chapin to change his testimony, he testified that he is "just about positive" that he trained the Grievant on the adjustable nature of the "Bendi Lift" seat "because I always do it" – "the lever has always been there."

31. The Employer granted the Grievant's request for an accommodation to extend the pedal on the "Bendi Lift" within twenty-four (24) hours.

32. The Grievant testified that the sole documentation evidencing her request to extend the pedal is the April 13, 2006 letter to Union's Counsel[29] and the contents are accurate.

33. The Employer's accommodation of the Grievant's request to be relieved of overtime and the offer to provide her work as a Utility Worker is consistent with accommodations afforded other workers with impairments.

34. The testimony of Michael Bates and the Union's own evidence[30] demonstrates the Employer is committed to making reasonable accommodations for employees with impairments.

35. Michael Bates testified that, notwithstanding these accommodations, the Employer has never permitted an employee to be permanently relieved of an essential job function.

36. Although the Employer has made a temporary accommodation for Shipping Clerk, McCrae, the evidence is undisputed that it is temporary while she is in her gradual work hardening program.

37. Michael Bates testified that McCrae, unlike the Grievant, has never presented a medical opinion stating she has reached "maximum medical improvement," nor has she ever asked to be permanently relieved of an essential job function.

38. Vincent Guertin testified and wrote in his January 4, 2006 letter[31] that the assignment of the Grievant to the North Plant, to cover McCrae's absence for medical reasons, "was pursuant to the normal direction of the workforce."

39. For her part, the Grievant testified that she never challenged the Union's conclusion that her assignment to the North Plant was consistent with the CBA.

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[29] Employer Exhibit, E-1.
[30] Union Exhibit, U-10.
[31] Joint Exhibit, J-15.

40. The Union was exactly correct when it stated (in Joint Exhibit 15) that the assignment of the Grievant to the North Plant was pursuant to the normal direction of the workforce and in accordance with the Employer's rights under the CBA as set forth in Article 16, Section 8.

41. There is no contractual basis for an employee to claim that his/her seniority affects the choice of working at either plant – Article 16, Section 8, expressly provides that seniority is considered in making shift assignments "subject to the Company's need for balanced shifts' and only after "a balance of skill level is obtained on each shift.

42. The actual theory underlying the Grievance is jurisdictionally flawed. There are four (4) separate reasons why the Grievant's theory fails under the plain language of the CBA.

43. The CBA does not confer the authority upon the Arbitrator to decide any issue other than the question of whether Articles 3 or 21 of the CBA were violated.

44. Specifically, the CBA does not confer authority on the Arbitrator to decide whether the Employer failed to make an accommodation for an allegedly disabled person under the ADA, because the ADA does not import into the contract any ADA-mandated obligation to make accommodations.

45. The CBA discrimination clause is just that – a pure nondiscrimination clause. It says nothing about any alleged duty to make an accommodation in situations where (unlike here) the employee is legitimately impaired in her ability to perform the essential functions of her job.

46. The CBA, confines the authority of the Arbitrator to matters arising under it.[32] Consequently the Union cannot now ask the Arbitror to render a decision regarding a matter that does not arise within the four corners of the CBA. Arbitrator Jones noted this jurisdictional rule in a similar case.[33]

47. In the instant case, the Grievant has filed an administrative charge of discrimination with the Minnesota Department of Human Rights (MDHR)[34] regarding the very same facts that are the subject of this Grievance. The charge is is still pending before MDHR. This is a matter that is solely for decision by MDHR.

48. Like "Altoona Hospital," the Union is prohibited from now asking the Arbitrator to rule on the "failure to accommodate" theory on jurisdictional grounds.

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[32] CBA, Article Article 20, Section 3.
[33] Altoona Hospital, 102 LA 650, 652 (Jones, Jr. 1993)
[34] Union Exhibit, U-6

49. The Grievant's professed inability to perform a single job for a six (6) month duration is not a "disability" under State or Federal Law.

50. The Grievant cannot meet her burden of proof of establishing that she ever had a bona fide disability under the ADA. It is black letter law that an impairment, which merely limits an employee's ability to do one particular job over a short period of time, is not a "disability."

51. It is well settled law under the ADA (and under the Minnesota Human Rights Act) that one has to be unable to do an entire broad class of jobs over a permanent or long term duration in order to argue she is disabled in the major life activity of working so as to claim protection as a "disabled" employee.

52. By the Grievant's own admission, she was always fully able to operate all of the equipment at the South Plant and always able to operate some of the equipment at the North Plant.

53. According to Grievant, no medical provider ever advised her that there was any broad class of jobs that she was unable to perform. Grievant's testimony was that her only limitation was vis-à-vis her (alleged) inability to operate the "Bendi Lift" for more than one and one half (1.5) hours per day, which is not a "disability" as defined by the ADA.

54. In Taylor v. Nimock's Oil Co., the Eight Circuit Court of Appeals reiterated the established rule that the "[i]nability to perform one particular job does not constitute a substantial limitation on working and therefore, is not a disability.[35]

55. To claim a boni fide disability so as to get protection under ADA, an employee must meet her burden of proof of demonstrating that she is "significantly restricted in the ability to perform a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training skills and abilities."[36]

56. An individual who argues that she is merely unable to do a *particular job, job type or narrow range of jobs* is not substantially limited in major life activity of working and, thus, is not "disabled" for purposes of either ADA or the Minnesota Human Rights Act.[37]

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[35] Taylor v. Nimock's Oil Co., 214 F.3d 957 (8th Cir. 2000).
[36] 29 C.F. R. Section 1630.2(j)(3).
[37] Gutridge v., Clure, 153 F.3d 898 (8th Cir. 1998) cert denied, 1999 U.S. Lexis 3255 (1999).
Miller v. City of Springfield, 146 F. 3d 612, 614-615 (8th Cir. 1998)
GTE North Incorporated, 113 LA 665, 672 (Brodsky 1999)
[37] Heisler v. Metropolitan Council, 339 F.3d 622, 628n. 4 (8th Cir 2003)
Kellogg v. Union Pacific-Railroad Company, 233 F. 3d 1083, 1087-1088 (8th Cir. 2000)

57. Overtime is the normal practice for many jobs and an impairment that prohibits an individual from working over 40 hours a week does not make that individual "disabled" under the ADA.[38]

58. While the notion that the Grievant did not know how to adjust the "Bendi Lift" seat prior to March 2006 is completely unbelievable and, frankly, disingenuous, the reality of the situation is that based on her own testimony, she is not a "disabled" individual under law because she was never unable to perform an entire broad class of jobs. For this reason, she has no basis to attempt to assert a "failure to accommodate" claim.

59. Grievant is also unable to claim protection under the ADA because her professed impairment was short lived. According to Grievant, it was only between September 2005 and March 24, 2006 that she was unable to perform all the essential functions of the Shipping Clerk position.

60. The Unites States Supreme Court has held that impairments, which are neither permanent nor long term, are not disabilities under ADA.[39] This principle of law is that, quite simply, conditions that are not permanent or even long term cannot be said to be "substantially" or "materially" limiting.[40]

61. The Eighth Circuit Court of Appeals recently noted, an employee who indicated she needed a modified work schedule for approximately six months cannot claim she is "disabled" because a six month limitation on an employee's ability to work is neither permanent nor long term.[41]

62. Because of the short-term duration of Grievant's claimed impairment (less than 26 weeks), she cannot now argue that she was "disabled" under the ADA, or under state law. For this additional reason, her theory of "failure to accommodate" fails as a matter of law.

63. Under the express language of the CBA, the Employer retains sole discretion to determine the qualifications of Shipping Clerks.

64. The grievance must be denied because CBA, Articles 3, 16 and the March 27, 1997 Letter of Agreement on page 41 of the CBA all demonstrate that the Employer retains the right to determine who is and who is not qualified to work as a Shipping Clerk.[42]

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[39] Toyota Motor Mfg. Ky., Inc. v. Williams, 534U.S. 184 (2002)

[40] Pollard v. High's of Baltimore, Inc. 281 F. 3d., 462 (4th Cir. 2002), cert. Denied 123 S. Ct. 122 (U.S. 2002)
Heintzelman v. Runyon, 120 F. 3d 143 (8th Cir. 1997)

[41] Samuels v. Kansas City Missouri School District. 437 F.3d 797, 802 (8th Cir. 2006)

[42] Joint Exhibit, J-1a and J-1b.

65. CBA, Article3, Section 8, provides the Employer with the sole and exclusive right to "establish, schedule and assign jobs." Article 16, Section 9 states: "The Employer shall have the right to make all job assignments in each classification. . ."[43]

66. The CBA Letter of Agreement, on page 41 of the CBA, unequivocally provides that: "The Company shall have the right to determine the contents of jobs and classifications and the qualifications necessary for employees to perform the work of jobs and classifications. . . "[44]

67. By professing inability to perform the essential functions of Shipping Clerk (operate "Bendi Lift" at North Plant), the Grievant rendered herself disqualified for that position. She cannot now be heard to claim that she actually was qualified to work as a Shipping Clerk. The CBA forbids such a ploy.

68. Arbitrator Woolf noted the established principle of law "that an employer is not required to have a second employee perform essential tasks of the job of the disabled employee in order to meet the test of accommodation required by the ADA."[45]

69. In *Jefferson-Smurfit Corporation* the arbitrator noted that a no discrimination clause in a CBA does not address the issue of an alleged duty to make accommodations for a disabled employee absent other evidence that the parties intended to incorporate such a duty into the CBA.

70. In *San Francisco Unified School District*, the arbitrator noted that "[t[he Americans With Disability [sic] Act requires fair treatment of qualified individuals with disabilities. It does not require the employer to eliminate or transfer essential functions to accommodate a disabled employee who cannot perform them."

71. The Employer had the sole right under the CBA to determine whether the Grievant could perform essential functions of the job. In light of this and the undisputed fact that she admittedly claimed an inability to perform certain essential functions for some twenty-six (26) weeks while she was receiving STD benefits, she cannot now claim that she was a "qualified" individual under the myriad civil case law authorities and arbitral precedent cited.

72. Assuming arguendo that the Grievant was a qualified individual with disability and the arbitrator has jurisdiction to decide an ADA-based failure to accommodate claim, the grievance is still deficient because the Employer did offer reasonable accommodations.

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[43] Joint Exhibit, J-1a and J-1b.
[44] Joint Exhibit, J-1a and J-1b.
[45] Rheem Manufacturing Company, 108 LA 193 (Woolf 1997).

73. The Employer afforded the Grievant reasonable accommodation by giving her the opportunity to work in the Utility Worker classification so long as she was not able to perform all functions of Shipping Clerk.

74. The Employer approved her use of a Styrofoam pedal extension within twenty-four (24) hours from receiving her request.

75. The Employer is merely required to grant any type of accommodation that is reasonable. The EEOC acknowledges the legal principle that an employer need not grant the requested accommodation that is the employee's first choice and any accommodation that is reasonable is sufficient for purposes of compliance with the ADA.[46]

76. The Grievant testified that she never took the time to compare the wage rate of Utility Worker to the STD benefit. Why? Because she obviously preferred to receive STD benefits without performing any work.

DISCUSSION

Based on the hearing record and arguments presented by the Parties in their post hearing briefs, the Arbitrator identifies the following issues requiring decision.

1. Is the Grievant disabled within the meaning of ADA and, if so, is her claim of lack of reasonable accommodation grievable under the CBA?

2. Was the Employer's position that the Grievant was not qualified to work as a Shipping clerk, so long as she claimed inability to operate the "Bendi Lift," a violation of the CBA?

3. Were the Grievant's actions, in obtaining medical support for not having to operate the "Bendi Lift" at the North Plant, based on boni fide medical reasons or a ploy to avoid working in the North Plant?

4. Is it reasonable that the Grievant did not know the seat on the "Bendi Lift" was adjustable until March of 2006?

The Union bases it case primarily on the contention that the Grievant is disabled within the meaning of ADA, was not given reasonable accommodation by the Employer and was subjected by her supervisor and co-worker(s) to unfair treatment, which was ignored by the Employer.

The Employer bases it case primarily on the contention that assignment of the Grievant to the "Bendi Lift" was necessary for business reasons and was consistent with that of other

[46] Treanor v. MCI Telecom, Corp., 200 F. 3d 570 (8th Cir. 2000).
ADA 29 C.F.R., Pt. 1630 app. Section 1630.9.

employees; that operation of the "Bendi Lift" was an essential part of Shipping Clerk work which was within the Employer's right to determine under the CBA; that the Grievant was offered accommodation to work as a Utility Worker and given STD when she chose it over working as Utility Worker; was promptly given further accommodation (pedal extension) when requested; that the Grievant's charge of failure to accommodate under MHRA and ADA is not a matter within the Arbitrator's authority.

The record shows that the Grievant was employed with Intek February 6, 1989 and first worked as a Utility Worker in fabrication. She then moved to various jobs over the following years including Operator, Materials Helper, Quality Inspector, and Shipping Helper. In August 2000 she became a Shipping Clerk, which involves operation of material handling machines generally referred to as forklifts.

The Grievant's accident, that resulted in her right leg deformity, occurred some years prior to her employment with Intek (1984). There is no evidence in the record that her leg deformity required any special accommodation prior to the instant matter, even though the positions she held appear to involve standing and operating machines with pedal controls (forklifts) similar to the "Bendi Lift."

The Grievant testified that she has some limits in walking and standing, because her right leg is shorter than her left.[47] She uses a lift on her right leg to compensate for the difference in length. The Grievant testified that, prior to operation of the "Bendi Lift" (about June 2005), she did not have a problem with her leg in performing her work.

The Grievant's described her problem with the "Bendi Lift" as causing pain in her leg because of the pedal position (hard to reach it) and, if she leaned too far forward the safety switch in the seat would shut the machine off.

The "Bendi Lift" has a seat adjustment lever visibly located in front of the seat but the Grievant claims that she did not know of this lever until February of 2006 when others brought it to her attention. She returned to work on or about April 4, 2006 and operated the "Bendi Lift" using the seat adjustment feature. About two weeks later, the Grievant, with the aid of Ron Chapin, fashioned and was authorized to use a Styrofoam block to extend the pedal, which added to her comfort. The record indicates no further problem or issue in her operation of the "Bendi Lift."

The Grievant testified that had the Employer accommodated her with a pedal extension earlier, she could have worked rather than go on STD. On cross-examination, the Grievant acknowledged that April 12, 2006 was the first occasion she requested a pedal extension. She also acknowledged that she did not bring up a pedal extension on March 24, 2006 when she and met with Union and management representatives regarding conditions for her return to work. She testified that on March 24, 2006 she slid the "Bendi Lift" seat forward and said; "I think I can do it."

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[47] Mayo Clinic Medical Evaluation of January 18, 2006, HISTORY OF PRESENT ILLNESS, quotes the Grievant as stating: "She can walk several blocks to a mile."

The Grievant testified on cross-examination that she asked fellow bargaining unit member, Ron Chapin about a pedal extension on April 12, 2006, but did not ask anyone from management. Chapin brought the matter to management where it was approved within 24 hours.

Employer Exhibit #E-2 is a series of photographs showing the "Bendi Lift" seat location and controls for operating the machine, including the lever that adjusts the seat position forward and backward. The seat also has a knob adjustment for tilting the seat.

The two seat controls are very visible. It is difficult to believe that a regular operator of this machine would not be aware of them. The lever for adjusting the seat forward and backward would even appear to touch the leg of the operator. With different employees operating the same machine, it seems axiomatic that the seat would be adjusted frequently to accommodate different sized operators and wouldn't have been in the same position each time the Grievant operated it.

Ron Chapin, Maintenance Lead and member of the Union Bargaining Unit testified that he trained the Grievant and other Shipping Clerks in operation of the "Bendi Lift." The Manual used in the training is in evidence as Employer Exhibit #E-3. The employees are given a copy of this Manual when being trained. Chapin pointed to page 13 of the Manual where there is an exercise on "Entering the Forklift" that highlights use of the seat:

> "Ease yourself into the seat and make any necessary adjustments such as the seat and steering tilt."

Chapin testified that he is very positive that he trained the Grievant and others on adjusting the seat. He testified that he was cautious about altering the pedal with an extension for fear that it could result in someone else getting hurt because of it. Arranging a temporary method of fastening it to the pedal allows for it to be removed when other operators use the machine.

Considering the evidence and testimony in the hearing record, the Arbitrator does not find the Grievant's claim creditable that she did not know the "Bendi Lift" seat was adjustable.

Vera Smith, Customer Service Representative, testified that she had a conversation with the Grievant on or about the time the Grievant obtained a medical note (J-2) limiting her work to eight (8) hours per day (September 7, 2005). Smith testified that the Grievant complained to her how tough it was to work at the North Plant with Tammy McCrae and said "I am going to get out of North Plant and get an excuse from my doctor."

Smith testified that the Grievant made the call to the doctor from her office and saw the doctor's note when the Grievant received it on the fax machine. Smith testified that she knew the Grievant was unhappy at the North Plant "but her limp was no different than normal."

On recall, the Grievant testified that she disagrees with Smith's testimony and denies talking to her about a problem working with Tammy McCrae. The Grievant testified that she had problems with McCrae in past but not since 2005. Intek knocked her down to Helper and had to train her (Grievant). Grievant testified that she thinks Smith made up her story to get back at her former supervisor.

The Grievant's issues with Tammy McCrae were corroborated by the testimony of Gail Dahl. Dahl testified that; "The relationship between Judy (Grievant) and Tammy McCrae isn't good, but they get along. McCrae is not easy to get along with."

As is often the case, the Arbitrator when confronted with conflicting testimony must make a determination of which witness is the most creditable. In this matter, the Arbitrator finds Smith's testimony more creditable. The Grievant's displays a hostile, vindictive and combative attitude and her testimony regarding the seat adjustment issue is not creditable.

While the Grievant has a motive for the contentions she is making, there is no evidence of Smith having a personal motive for revealing what she knows about this matter. Smith testified as to her reason for revealing the incident: "It came up in a conversation with my boss and I thought it was the right thing to do and felt it was my duty to reveal what I knew about it."

With respect to the Grievant's disability status as defined under ADA guidelines, the Arbitrator finds to the contrary. The record does not support the contention that the Grievant lacks the ability to perform one or more major life functions. Although she may be limited in the length and time she can be on her feet[48], she is sufficiently mobile to have "functioned successfully for years as a Shipping Clerk without any accommodation whatsoever."[49] Intek has employed her for over seventeen years in a variety of positions requiring different physical abilities and there is nothing in the record to indicate any accommodation was necessary. The Grievant's testimony was that, "Prior to the "Bendi Lift," in the summer of 2005, did not have a problem with the injured foot."

The evidence shows that she had reached maximum medical improvement years ago.[50] Whatever problem she had with operating the "Bendi Lift" in September 2005 was easily resolved by adjusting the seat. It was not likely that anyone but the Grievant would have believed a pedal extension was necessary because the Grievant already wears a lift on her right shoe to even the length of her right leg with the left. The record shows that the pedal extension makes it more comfortable for the Grievant to operate the "Bendi Lift" pedal, but she is able to operate the machine without it.

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[48] Mayo Clinic Medical Evaluation of January 18, 2006, HISTORY OF PRESENT ILLNESS, includes a statement by Grievant that, "she can walk several blocks to a mile."

[49] Union's post hearing brief at page 15.

[50] Joint Exhibit, J-10, at page 2, 5th line from bottom.

On March 24, 2006, when the Grievant acknowledged the "Bendi Lift" seat was adjustable, she stated: "I think I can do it [operate Bendi Lift]." The Grievant's testimony on recall at the end of the hearing was. "I am working at the North Plant and it is OK, no problems."

The Arbitrator finds that the Employer was not in violation of the CBA in determining that operation of the "Bendi Lift" is an essential requirement of the Shipping Clerk position. The record shows that this particular lift is essential to operations at the North Plant due to the narrow aisles. The record shows that, due to absences and work load fluctuations, it is necessary that all Shipping Clerks are able to operate the "Bendi Lift' and other similar machines.

Michael Bates testified he did an analysis in August 2005 and found that the records show time off equals "roughly forty (40) days per employee, due to absences (PTO, vacation, Etc.). Bates testified that the analysis had nothing to do with the instant grievance matter but was needed to address the need to train all Shipping Clerks in all functions at both the North and South Plants.

Gail Dahl testified that there were four (4) employees at the South Plant and when there was a need at the North Plant, employees decided who would go and took turns, depending on orders, vacations, Etc.

Chris Odman testified the North Plant required more than the one Shipping Clerk assigned and it was necessary to assign South Plant Shipping Clerks, including the Grievant, to the North Plant to cover work requirements. Odman testified that employees rotated going to the North Plant and the Grievant was not assigned more frequently than the others.

Under language of the CBA, the Employer has authority to "determine the contents of jobs and classifications and the qualifications necessary for employees to perform the work of jobs and classifications."[51] The Employer also has authority under the language of the CBA for "direction and supervision of the working forces. . . The right to . . . establish, schedule and assign jobs. . ." and to ". . . make all job assignments in each classification. . ."[52]

Union Business Agent, Vincent Guertin, acknowledged the Employer's exercise of authority with respect to the Grievant's situation in a letter to the Grievant dated January 4. 2006,[53] as follows:

> "In discussion with management and Chief Steward Scott Clothier, this representative has reached the conclusion that your assignment for the reasons stated is normal direction of workforce to cover Ms. McCrae's absences."

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[51] CBA, Letter of Agreement, page 41, dated March 27, 1997.
[52] CBA, Article 3, (2) and (8), Management Rights
CBA, Article 16, Section 9. Work Assignments.
[53] Joint Exhibit, J-15.

Although the motives on the part of both the Grievant and Employer may be questionable in the instant matter, the Arbitrator does not find a violation of the CBA. Although the Arbitrator does not find sufficient evidence to support a violation of the CBA language in Article 21 (Nondiscrimination), the Grievant has a charge pending before the State Department of Human Rights, the agency specifically established to investigate and issue findings in such matters.

Based on the Grievant's demeanor in the hearing, that indicates a potential for conflict with others, it is understandable, although not necessarily excusable, why the Employer may not have been responsive to her complaints about other employees.[54]

Based on the record, the Arbitrator finds the Grievant's claim of a need for accommodation in operating the "Bendi Lift' essentially without merit. Simply adjusting the seat was the solution to her problem, which she already knew or should have known from her training. Extending the pedal, although not essential for her to operate the "Bendi Lift," added to her comfort. The record indicates she had apparently discussed this with fellow bargaining unit member Ron Chapin, but had not made a request to management. It is understandable that management did not initiate this accommodation for the Grievant already wears a lift (extension) on her right leg to extend it even with her left leg.

The findings of the medical authorities did not reveal any change in the Grievant's physical condition from years ago, other than echo her claim that she was suffering pain when operating the "Bendi Lift" and, based on her claim, proposed reduction in her work activity.[55]

It is further noted that in Mayo Clinic's Treatment Plan of January 18, 2006 was the comment "that this is not a work injury and that it would be probably be best to go through her Union to see what could be done."[56] There was no change found in her physical status for she had "reached maximum medical improvement years ago.""[57]

On March 31, 2006 the Union, Employer and Grievant reached a "Temporary Accommodation Agreement" in light of the Grievant's acknowledgement that the "Bendi Lift" seat is adjustable. The Grievant returned to work full time on, or about, April 4, 2006 and, according to the record, has since successfully performed all essential functions of the Shipping Clerk job classification without incident, including operation of the "Bendi Lift" at the North Plant.

On May 5, 2006 the Mayo Clinic provided a final medical report to the Grievant stating: "This is to certify that the above named patient may RETURN TO work/school. Full-

[54] Union Exhibit, U-3.
[55] Joint Exhibit, J-2. J-3, J-13. and J-20.
[56] Union Exhibit, U-8, page 3, Plan.
[57] Joint Exhibit, J-10.

time: 5/5/06. Restrictions: May return to work driving forklift as tolerated with a pedal extension to help alleviate pain."[58]

In summary, the Arbitrator does not find the Employer's refusal to allow the Grievant to work as a Shipping Clerk, while she alleged inability to operate the "Bendi Lift," a violation of the CBA. The Employer provided reasonably accommodations to the Grievant by; (1) eliminating overtime work; (2) providing alternative work opportunity in a former work classification (Utility Worker); (3) providing disability payments while the Grievant was off work; and (4) approving use of a pedal extension when requested.[59]

AWARD

The grievance is denied.

The Employer did not violate the CBA in refusing to allow the Grievant to work as a Shipping Clerk while she claimed inability to operate the "Bendi Lift and received disability benefits."

CONCLUSION

The Parties are commended on the professional and thorough manner with which they presented their respective cases. It has been a pleasure to be of assistance in resolving this grievance matter.

Issued this 29th day of December 2006 at Edina, Minnesota.

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ROLLAND C. TOENGES, ARBITRATOR

[58] Joint Exhibit, J-20.

[59] The testimony of Ron Chapin was that he was cautious about altering the pedal with an extender in that, while it serves the Grievant's interest, it could create a safety hazard for other operators.